

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(San Jose, California)

O’CONNOR HOSPITAL,

Employer

and

NATIONAL UNION OF HEALTHCARE WORKERS,

Case 32-RC-5614

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION,
UNITED HEALTHCARE WORKERS-WEST

Intervenor

REGIONAL DIRECTOR’S DECISION AND
DIRECTION OF ELECTION

The Employer, O’Connor Hospital, operates an acute care hospital located in San Jose, California. The Petitioner, National Union of Healthcare Workers, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act to represent a unit of “all full-time, regular part-time, limited part-time and per diem Service and Maintenance employees employed by O’Connor Hospital, including those listed in Appendix C” of a collective-bargaining agreement between the Employer and the Intervenor, Service Employees International Union, United Healthcare Workers-West, which had expired prior to the filing of the petition. Subsequent to the filing of the petition, the Employer and the Intervenor executed a new collective-bargaining agreement effective May 1, 2009 through April

30, 2012 which, like the expired agreement, covers a unit of “all full-time, regular part-time, limited part-time and per diem Service and Maintenance employees employed by O’Connor Hospital, including those listed in Appendix C.” The Employer currently employs about 450 employees in the unit covered by its collective-bargaining agreement with the Intervenor.

A hearing officer of the Board held a hearing on April 22, 2010.¹ The Petitioner, the Employer and the Intervenor appeared at the hearing and participated, and they all filed post-hearing briefs with me. At the hearing, all parties reached a stipulated agreement that the appropriate unit of Service and Maintenance employees at O’Connor Hospital consists of the job classifications covered by the current collective-bargaining agreement between the Employer and the Intervenor, with the exception of 10 job classifications that the Petitioner disputed: Bill Hold/Charge Auditor; Cardio-Pulmonary Technician; Case Management Assistant; Charge Capture Auditor; Clinical Assistant/Back & Front Office; Lead Material Technician; Lead Radiology Scheduler; Secretary; Senior Pharmacy Technician/Buyer; and Transcriber Clerk. The Petitioner contended at the hearing that it did not have enough information about the job duties involved in these positions or their placement within the Employer’s organizational structure to stipulate that they are properly included in the bargaining unit. Subsequent to the hearing, after reviewing the job descriptions provided by the Employer at the hearing, the Petitioner stipulated in its brief to include all of the disputed classifications in an appropriate unit, except the position of Secretary. Thus, the Secretary position is the only classification that remains in dispute.

Despite the Employer’s and the Intervenor’s agreement that the appropriate unit consists of the job classifications covered by their current contract, they contend that the petition should be dismissed because the Petitioner now seeks a bargaining unit different from what is described

in the petition. When it filed the petition, the Petitioner attached the wrong pages of “Appendix C” of the expired agreement, thus listing the job classifications for a different facility, Seton Medical Center/Seton Medical Center-Coastside, rather than the correct pages that listed the job classifications for O’Connor Hospital. Both O’Connor Hospital and Seton Medical Center/Seton Medical Center-Coastside are parties to the same multi-employer collective-bargaining agreement between the Intervenor and several related hospitals, and the job classifications for both units are listed in Appendix C of the same agreement.² By attaching the wrong pages of Appendix C, the Employer and the Intervenor assert that the Petitioner failed to accurately describe the petitioned-for unit. Thus, the Employer and the Intervenor claim that the Petitioner effectively amended the petition at the hearing on April 22, at a time when the current collective-bargaining agreement between the Employer and the Intervenor is in effect; therefore, the amended petition was untimely filed under the Board’s contract bar rule and should be dismissed.

I have considered the record evidence and the arguments presented by the parties at the hearing and in their briefs. As discussed below, I find no merit to the Employer’s and Intervenor’s contentions that the Petitioner amended the petition at the hearing or that the “amended petition” is barred by the collective-bargaining agreement currently in effect between the Employer and the Intervenor. I further find that the bargaining unit of Service and Maintenance employees described in the current collective-bargaining agreement between the Employer and the Intervenor, effective May 1, 2009 to April 30, 2012, is an appropriate unit

¹ All dates hereinafter refer to 2010 unless otherwise stated.

² The parties to the expired multi-employer collective-bargaining agreement were the Intervenor and O’Connor Hospital, Saint Louise Regional Hospital, and Seton Medical Center/Seton Medical Center-Coastside. In addition to these employers, the current collective-bargaining agreement also includes St. Francis Medical Center.

except that employees in the position of “Secretary” may vote subject to challenge by any party who wishes to challenge their eligibility to vote.³

THE FACTS

On February 2, 2009, the Petitioner filed a petition to represent a unit “as described in expired collective-bargaining agreement – See Attachment A.” The collective-bargaining agreement referenced by the petition, and included as Attachment A, was the expired agreement between the Employer and the Intervenor, which was in effect from November 10, 2004 to November 11, 2008. As described in Attachment A, the Petitioner seeks a unit of “all full-time, regular part-time, limited part-time and per diem Service and Maintenance employees employed by O’Connor Hospital, including those listed in Appendix C.” Appendix C is a 23-page document that lists the job classifications and wage rates for all of the bargaining-unit positions at O’Connor Hospital, Saint Louise Regional Hospital and Seton Medical Center/Seton Medical Center-Coastside. The Petitioner attached the first three pages of the collective-bargaining agreement and three pages of Appendix C to its petition. However, the Petitioner attached the pages of Appendix C that list the job classifications for the Seton Medical Center/Seton Medical Center-Coastside units, not the O’Connor Hospital unit. The Petitioner stated at the hearing and in its post-hearing brief that the inclusion of the Seton Medical Center/Seton Medical Center-Coastside list, rather than the O’Connor Hospital list, was a clerical error. There is no evidence that any party ever understood the petition to refer to the Seton Medical Center/Seton Medical Center-Coastside unit rather than the O’Connor Hospital unit.

³ The “Secretary” position does not include employees in the positions of “Ambulatory Services Secretary,” “ER Secretary,” “Tumor Registry F/U Secretary,” and “Ultrasound Secretary,” who are included in the bargaining unit found appropriate herein and are eligible to vote.

Between the date the petition was filed and the date of the hearing, the Employer and the Intervenor executed a new collective-bargaining agreement. The new agreement incorporates some changes to the job classifications in the bargaining unit. Due to these changes, some of the job classifications listed in the current contract are not exactly the same as the job classifications listed in the expired contract, which was cited in the petition.

Positions Re-Named

Under the new contract, six job titles were re-named: Admitting Representative/Patient Representative; Communication Tech Ambulatory; Communication Tech ER; Communication Tech OB; Transcriber Laboratory; and Transcriber Radiology. The Employer's Vice President of Human Resources, Julie Hatcher, testified that the job title Admitting Representative/Patient Representative was shortened in the new contract to simply Admitting Representative. The job titles Communication Tech Ambulatory, Communication Tech ER and Communication Tech OB were condensed into just one job title: Communication Tech. Similarly, the job classifications Transcriber Laboratory and Transcriber Radiology were combined under one job title: Transcriber. Hatcher testified that the apparent changes to these bargaining-unit positions were changes in name only. There was no change in the employees' job duties.

Positions Eliminated

In addition to the name changes, five job titles were eliminated: Database Support; Home Health Aide; Home Health Patient Account Representative; Home Health Transcriptionist; and Unit Secretary. Hatcher testified that those titles were eliminated from the list of bargaining-unit positions because no one was employed in those positions, and the Employer no longer uses those job titles. According to Hatcher, the Employer had never employed anyone in the positions of Database Support or Unit Secretary. The positions of Home Health Aide, Home

Health Patient Account Representative and Home Health Transcriptionist were all eliminated in late 2004 or early 2005 when the Employer discontinued its Home Health Department and began outsourcing that service. The Employer and the Intervenor agreed to remove the job titles from the current collective-bargaining agreement because the positions no longer exist.

Positions Added

The unit description in the current collective-bargaining agreement also adds 18 job titles that were not listed in the expired contract: Admitting Clerk; Admitting Clerk II; Bill Hold/Charge Auditor; Cardio-Pulmonary Technician; Case Management Assistant; Charge Capture Auditor; Clinical Assistant/Back & Front Office; Communication Tech; Laboratory Assistant I; Lead Food Service Worker; Lead Material Technician; Lead OB Scrub Technician; Monitor Technician; MRI Scheduler; Pharmacy Technician/Buyer; Radiology Scheduler; Radiology Scheduler Lead; and Transcriber. The evidence shows that all of these positions existed under the expired contract, even though the job titles are not listed. Some of the jobs existed under different names, but most of them were added to the unit during the term of the expired contract by agreement between the Employer and the Intervenor.

The evidence shows that several of the “new” job classifications were just name changes. The Case Management Assistant listed in the current collective-bargaining agreement was listed in the expired agreement simply as Case Management, but the position is the same. Hatcher testified that the employees in the position have always been assistants, and their job duties have not changed. Similarly, as discussed above, the generic Transcriber classification in the current contract replaces the former Transcriber Laboratory and Transcriber Radiology classifications.

Hatcher testified that the Employer employs only one Transcriber, and the employee works in the Medical Records Department.⁴

Although the Cardio-Pulmonary Technician was not listed in the expired collective-bargaining agreement, the evidence shows that the position is not new. Hatcher testified that there is only one employee in this position, and the employee has been employed under the Cardio-Pulmonary Technician title since 2002. Although Hatcher did not offer an explanation regarding the reason why the job title was left out of the expired contract, there is no evidence that the incumbent was previously excluded from the bargaining-unit.

Similarly, Hatcher testified that the Clinical Assistant/Back & Front Office position has existed since at least September 2006, when she came to work for the Employer. This position is located in the Pediatric Center for Life, which is a small outpatient clinic across the street from the main hospital. There are three employees in this position, and, although the position was not listed in the expired collective-bargaining agreement, there is no evidence that the employees were previously excluded from the bargaining unit.

The Admitting Clerk and MRI Scheduler were added to the bargaining unit in September 2006 when the Employer acquired an MRI Center. Hatcher testified that the Admitting Clerk does the admitting work in the MRI department, and the MRI Scheduler does the scheduling work in the MRI department. The Employer and the Intervenor updated the list of job classifications in the current collective-bargaining agreement to include these positions, which have existed in the bargaining unit since September 2006.

⁴ Although there were two Transcriber positions listed in the expired agreement, Transcriber Laboratory and Transcriber Radiology, Hatcher testified that no one was employed in the Transcriber Radiology position, and only one person was employed in the Transcriber Laboratory classification. That employee works in the Medical Records Department, and the employee's job title is now simply Transcriber.

The Bill Hold/Charge Auditor and Charge Capture Auditor are clerical positions in the Emergency Department that were also created during the term of the expired contract. The Bill Hold/Charge Auditor is responsible for verifying that Emergency Department charges are accurately coded in the billing system. The Charge Capture Auditor verifies that the correct ordering procedures are followed, maintains the Emergency Department logbook and prepares charts. There is one employee in each position. Both of the positions were already included in the bargaining unit at the time the petition was filed because they were added to the unit by agreement between the Employer and the Intervenor during the life of the expired contract, and the Employer and the Intervenor updated the list of job classifications in the current contract to include them.

The new job titles Admitting Clerk II (Radiation Therapy), Radiology Scheduler and Lead Radiology Scheduler were created in 2008 when the Employer dissolved its One-Call Department and moved these job functions to the Radiology Department. Pursuant to the restructuring of these departments, the employees' in the positions were given new job titles, and the positions were added to the bargaining unit in 2008, during the term of the expired contract, by agreement between the Employer and the Intervenor.

The Laboratory Assistant I and Monitor Technician jobs were also created in 2008 and added to the bargaining unit by agreement between the Employer and the Intervenor. Hatcher testified that the Employer created the Laboratory Assistant I position because it needed an entry-level laboratory position. There is currently only one Laboratory Assistant I, and the employee, like the other bargaining-unit employees in the laboratory, reports to the Laboratory Director. Although there is less evidence in the record regarding the Monitor Technician, Hatcher testified that the only employee currently in the position was added to the bargaining

unit in 2008, during the term of the expired contract, by agreement between the Employer and the Intervenor.

The evidence shows that the Lead Food Service Worker and Lead OB Scrub Technician classifications were added to the current collective-bargaining agreement in order to give an official job title to positions that already existed during the term of the expired agreement. Hatcher testified that a bargaining-unit employee in each of these areas had been performing lead responsibilities and receiving a pay differential for several years. During negotiations for the current contract, the Employer and the Intervenor agreed to recognize the employees' increased responsibilities and pay by adding the "lead" job titles and pay rates to the wage scale. Similarly, the Lead Material Technician position was created by agreement between the Employer and the Intervenor in September 2006 in order to provide a promotional opportunity for a bargaining-unit employee. When the list of job titles was updated for the current collective-bargaining agreement, this position was added to the list.⁵ Like the lead positions, the Senior Pharmacy Technician/Buyer position was also established by agreement between the Employer and the Intervenor in September 2006, during the term of the expired contract, in order to create a senior position for a long-time employee. The position was then added to the list of job classifications in the current contract.

The Secretary Position

Finally, the Secretary position was added to the list of job classifications in the current collective-bargaining position. At the hearing, the Employer failed to provide a job description for the "Secretary" position, and Hatcher's testimony was insufficient to establish how, or when, this position was added to the bargaining unit. Hatcher testified that she believes there is only

⁵ None of the parties contend, and there is no evidence suggesting, that the Lead Food Service Worker, Lead OB Scrub Technician, Lead Material Technician, or Lead Radiology Scheduler are statutory supervisors.

one employee currently in the Secretary position, and she believes the employee works in one of the clinics. The Petitioner petitioned for a bargaining unit that included five secretary classifications, including four secretary classifications that are listed in both the expired and the current collective-bargaining agreements and whose placement in the bargaining unit is thus undisputed. The fifth secretary position, Unit Secretary, was eliminated, and the Secretary position at issue herein was added, so that a total of five secretary positions remain in the bargaining unit. Although the Employer failed to provide a job description for the Secretary position, the Petitioner similarly failed to present any evidence, such as employee testimony, to support its claim that the Secretary position is an office clerical position.⁶

ANALYSIS

The Employer and the Intervenor assert that the Petitioner effectively amended its petition at the hearing on April 22 when it indicated that the petition does not seek a unit of Seton Medical Center/Seton Medical Center-Coastside job classifications and that the Seton Medical Center/Seton Medical Center-Coastside list was attached to the petition by mistake.

⁶ At the hearing and in its post-hearing brief, the Petitioner asserted that the Hearing Officer erred by partially granting the Employer's Petition to Revoke Subpoena Duces Tecum No. B-567754, which was served on the Employer at the Petitioner's request, instructing the Employer to present numerous documents regarding bargaining-unit job classifications. As the Petitioner conceded at the hearing, the Employer complied with paragraphs 1-3 of the 10-paragraph subpoena. The Hearing Officer found that the remainder of the subpoena was substantially satisfied by the documents presented at the hearing and the testimony of the Employer's Vice President of Human Resources, Julie Hatcher. To the extent that the subpoenaed information was not substantially provided at the hearing, the Hearing Officer granted the Employer's Petition to Revoke on the basis that the remaining information was unnecessary to determining an appropriate bargaining unit.

In its post-hearing brief, the Petitioner requested that I reverse the Hearing Officer's ruling, order the Employer to comply with the subpoena in its entirety, and re-open the record to receive additional evidence responsive to the subpoena. I find that the Employer substantially complied with the Subpoena Duces Tecum through the documents and testimony it provided at the hearing, and the remaining information sought by the Petitioner is not necessary to my decision herein regarding an appropriate bargaining unit. Moreover, to the extent that the record is incomplete with respect to the "Secretary" position, I have determined that employees in the "Secretary" position may vote subject to challenge by any party who wishes to challenge their eligibility to vote; however, the "Secretary" position does not include employees in the positions of "Ambulatory Services Secretary," "ER Secretary," "Tumor Registry F/U Secretary," and "Ultrasound Secretary," who are included in the bargaining unit found appropriate herein and are eligible to vote. Accordingly, I deny the Petitioner's request to re-open the record for receipt of additional evidence responsive to the subpoena.

Alternatively, they contend that the Petitioner amended its petition at the hearing when it sought to describe the bargaining unit as it is described in the current collective-bargaining agreement between the Employer and the Intervenor, rather than as it was described in the expired collective-bargaining agreement that was cited in the petition. In either case, they claim that the petition was amended at the hearing on April 22; therefore, it is barred by the current collective-bargaining agreement between the Employer and the Intervenor and should be dismissed as untimely. I find no merit to the Employer's and Intervenor's arguments that the petition was amended at the hearing and should be dismissed. First, I find that the evidence in the record supports the Petitioner's claim that its inclusion of the Seton Medical Center/Seton Medical Center-Coastside job classifications was a clerical mistake, and the petition clearly indicates that the petitioned-for unit is a unit of Service and Maintenance employees at O'Connor Hospital. Second, I find that the Service and Maintenance unit at O'Connor Hospital as it is now described in the current collective-bargaining agreement is not substantially different from the unit described in the former collective-bargaining agreement cited in the petition; therefore, the February 2, 2009 filing date is controlling. Accordingly, I shall direct an election in that unit, except that employees in the position of "Secretary" may vote subject to challenge by any party who wishes to challenge their eligibility to vote.

The evidence clearly indicates that the petitioned-for unit is a unit of Service and Maintenance employees at O'Connor Hospital.

The Petitioner petitioned to represent a bargaining unit of Service and Maintenance employees described in the expired collective-bargaining agreement between the Employer and the Intervenor. The Petitioner attached the first three pages of the expired agreement to the petition and circled the recognition clause, clearly indicating that the petitioned-for unit is a unit of "... employees employed by O'Connor Hospital." The recognition clause further describes

the unit employees as “including those listed in Appendix C,” and the Service and Maintenance and Technical job classifications at O’Connor Hospital *are* listed in Appendix C. Thus, the recognition clause referred all parties to the correct Appendix C, as there is only one Appendix C to the collective-bargaining agreement. However, the Petitioner attached the wrong pages of Appendix C by attaching the pages that list the job classifications at Seton Medical Center/Seton Medical Center-Coastside, rather than the pages that list the classifications at O’Connor Hospital. Nonetheless, despite the attachment of the Seton Medical Center/Seton Medical Center-Coastside list, the petition itself correctly identified the Employer as O’Connor Hospital, correctly identified the approximate number of employees in the unit as 420, and correctly identified the bargaining unit as the Service and Maintenance employees employed by O’Connor Hospital.⁷ Based on this information in the petition, there is no reasonable basis for concluding that the petitioned-for unit was the Seton Medical Center/Seton Medical Center-Coastside unit, rather than the O’Connor Hospital unit, despite the attachment of the Seton Medical Center/Seton Medical Center-Coastside job titles.

The Petitioner stated at the hearing and in its brief that the attachment of the Seton Medical Center/Seton Medical Center-Coastside list was a clerical error. The Employer argues in its brief that there is not a shred of evidence to support the theory that the inclusion of the Seton Medical Center/Seton Medical Center-Coastside list was a mistake. On the contrary, the petition itself and the referenced recognition clause clearly indicate that the petitioned-for unit is the Service and Maintenance unit at O’Connor Hospital. Thus, the Seton Medical Center/Seton Medical Center-Coastside list is incongruous with the rest of the petition, which supports the

⁷ At the hearing, Hatcher testified that the approximate number of employees currently in the unit is 450. In a unit as large as the O’Connor Hospital unit, I find that the approximate number of bargaining-unit employees indicated on the petition as 420 was proximate enough to identify the O’Connor unit as the petitioned-for unit.

Petitioner's argument that the attachment of the Seton Medical Center/Seton Medical Center-Coastside list was a mistake.⁸ Based on the foregoing and the record as a whole, I find that the Petitioner did not amend its petition by recognizing at the hearing that the Seton Medical Center/Seton Medical Center-Coastside list was attached to the petition, rather than the O'Connor Hospital list, and stating that this was done in error.

The evidence shows that the bargaining unit described in the Employer's and the Intervenor's current collective-bargaining agreement is not substantially different from the unit described in the former collective-bargaining agreement cited in the petition.

As discussed above, the Petitioner petitioned to represent a bargaining unit of Service and Maintenance employees employed by O'Connor Hospital as described in the expired collective-bargaining agreement between the Employer and the Intervenor. Between the date the petition was filed and the date of the hearing, the Employer and the Intervenor executed a new collective-bargaining agreement, which incorporates some changes to the job classifications in the bargaining unit. Due to these changes, the bargaining unit described by the Employer's and Intervenor's current contract is not exactly the same as the bargaining unit described by their former contract, which was cited in the petition. At the hearing, the Employer and the Intervenor stipulated that the job classifications in an appropriate unit of Service and Maintenance employees are the classifications covered by their current collective-bargaining agreement. Although the Petitioner was not prepared to stipulate at the beginning of the hearing that the new job classifications should be included in the unit, by the close of the hearing, the Petitioner stipulated to the inclusion of most of the new job classifications. Subsequently, in its post-hearing brief, the Petitioner stipulated that all of the job classifications listed in the current

⁸ There is no evidence in the record that any of the parties ever understood the petitioned-for unit to be any unit other than the O'Connor Hospital unit

collective-bargaining agreement should be included in an appropriate unit, with the one exception of the Secretary position, which the Petitioner maintains is presumptively an office clerical position and should therefore be excluded from the unit. Thus, based on the parties' stipulations and the record as a whole, the unit now includes some classifications that did not exist in the bargaining unit at the time the Petitioner filed the petition, while other classifications have been eliminated.

When a request for an alternative bargaining unit "seeks a unit that is substantially larger and different in character" from the unit sought in the original petition, the request constitutes an amended petition and, in those circumstances, is "treated as a new petition filed on the date of the amendment." *Brown Transport Corp.*, 296 NLRB 1213, 1214 (1989). However, the filing date of the original petition rather than any subsequent amendment is the controlling date "if the employers and the operations or employees involved were contemplated by or identified with reasonable accuracy in the original petition, or the amendment does not substantially enlarge the character or size of the unit or the number of employees covered." *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 at fn. 12 (1958). Here, the original petition accurately identified the Employer as O'Connor Hospital and accurately identified the employees as the unit of Service and Maintenance employees covered by the Employer's expired collective-bargaining agreement with the Intervenor. Although the new collective-bargaining agreement between the Employer and the Intervenor reflects some changes to the job classifications within the unit, the current classifications, like those in the expired contract, represent the Service and Maintenance employees employed by the Employer.

Under the new collective-bargaining agreement, a total of 11 job titles were removed from the list of bargaining-unit job classifications. However, of the 11 classifications that were

apparently removed, the evidence shows that six of them were merely re-named. The Admitting Representative/Patient Representative title was shortened in the new contract to simply Admitting Representative. The titles Communication Tech Ambulatory, Communication Tech ER and Communication Tech OB were condensed into one job title: Communication Tech. Similarly, the job classifications Transcriber Laboratory and Transcriber Radiology were also combined under the same job title: Transcriber. The employees in these positions did not change, nor did their job duties. Thus, the changes were in name only and did not change the size or the character of the bargaining unit.

Five bargaining-unit job titles were removed from the list of unit classifications because no one was employed in those positions, and the Employer no longer uses those job titles. No one had ever been employed in the Database Support and Unit Secretary classifications. Similarly, no one had been employed as a Home Health Aide, Home Health Patient Account Representative or Home Health Transcriptionist since late 2004 or early 2005, when the Employer closed its Home Health Department and outsourced that service. Thus, the removal of these job classifications from the current contract did not remove any employees from the bargaining unit or change the size or character of the bargaining unit in any other way.

Although the unit description in the current contract also adds 18 job titles that were not listed in the expired contract, the evidence shows that all of the positions actually existed under the expired contract and were already included in the bargaining unit at the time the petition was filed on February 2, 2009. The Case Management Assistant position is not new, as the same job existed under the expired contract, but was listed in the wage scale simply as Case Management. Similarly, the Clinical Assistant/Back & Front Office position has existed since at least September 2006, and the Cardio-Pulmonary Technician position has existed since at least 2002.

Although the record does not include an explanation regarding why these job titles were not listed in the expired contract, there is no evidence that the employees' in these positions were previously excluded from the bargaining unit. Thus, there is no evidence that the addition of these job titles changed the size or the character of the bargaining unit.

In the MRI Department, the Admitting Clerk and MRI Scheduler positions were created in September 2006. In the Emergency Department, the Bill Hold/Charge Auditor and Charge Capture Auditor positions were also created during the term of the expired contract. In the Radiology Department, the Admitting Clerk II (Radiation Therapy), Radiology Scheduler and Lead Radiology Scheduler were created in 2008, during the term of the expired contract. Similarly, the Laboratory Assistant I and Monitor Technician jobs were also created in 2008. All of the positions were added to the bargaining unit by agreement between the Employer and the Intervenor during the term of the expired collective-bargaining agreement and were already included in the bargaining unit at the time the petition was filed in February 2009.

The new Senior Pharmacy Technician/Buyer position, as well as the new "lead" positions, including Lead Food Service Worker, Lead OB Scrub Technician and Lead Material Technician, were negotiated by the Employer and the Intervenor and added to the bargaining unit during the term of the expired contract. The evidence shows that the "lead" job titles were created merely to formalize the increased responsibilities and pay that some bargaining-unit employees had acquired. Similarly, the Senior Pharmacy Technician/Buyer position was created in order to provide a senior position for a long-time employee. There is no evidence that the addition of these job titles to the list of job classifications in the current contract added any new employees to the bargaining unit. On the contrary, the evidence suggests that the same employees were performing the same job duties under the expired contract, and their new job

titles merely reflect the increased responsibilities they had acquired. Thus, I find that the new “senior” and “lead” positions did not change the size or character of the bargaining unit.

The “Secretary” position, which is the only position still in dispute, was not listed as a bargaining-unit job title in the expired contract, and there is no evidence regarding when this title was added to the bargaining unit. Apparently, one person is employed in this position, which is presently included in the bargaining unit covered by the Employer’s and the Intervenor’s current collective-bargaining agreement, which is comprised of approximately 450 employees. It is undisputed that the bargaining unit includes other secretary positions. The Ambulatory Services Secretary, the ER Secretary, the Tumor Registry F/U Secretary, and the Ultrasound Secretary are all bargaining-unit positions that were listed in the expired collective-bargaining agreement, as well as in the current agreement. The Petitioner originally sought to include these secretary positions in the unit, in addition to the Unit Secretary position, which has now been eliminated. Thus, the inclusion or exclusion of the “Secretary” position from the bargaining unit will not change the character or size of the unit.

By stipulating to the unit of Service and Maintenance employees that is described in the current collective-bargaining agreement between the Employer and Intervenor, with the one exception of the Secretary position, the Petitioner conformed its petition to reflect the job classifications that exist in the bargaining unit today. When an amended petition merely conforms the description of the unit to more accurately reflect the unit sought, the filing date of the original petition remains the controlling date, as long as the amended description does not enlarge the character or size of the unit. *Dobbs International Services, Inc.*, 323 NLRB 1159, 1160 (1997). As discussed above, the changes to the job classifications reflected in the Employer’s current collective-bargaining agreement with the Intervenor did not enlarge the

character or size of the petitioned-for unit. Thus, the filing date of the original petition, February 2, 2009, remains the controlling date, and as there was no collective-bargaining agreement in effect at that time covering the petitioned-for unit, the contract bar does not apply. Accordingly, I find the bargaining unit of Service and Maintenance and Technical employees described in the current collective-bargaining agreement between the Employer and the Intervenor, effective May 1, 2009 to April 30, 2012, to be an appropriate unit. However, as previously stated, employees in the position of “Secretary” may vote subject to challenge by any party who wishes to challenge their eligibility to vote.⁹

CONCLUSIONS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.
4. The parties stipulated, and I find, that the Intervenor is a labor organization within the meaning of the Act.
5. The Petitioner claims to represent certain employees of the Employer.

⁹ The “Secretary” position does not include employees in the positions of “Ambulatory Services Secretary,” “ER Secretary,” “Tumor Registry F/U Secretary,” and “Ultrasound Secretary,” who are included in the bargaining unit found appropriate herein and are eligible to vote.

6. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

7. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time, limited part-time and per diem Service and Maintenance employees employed by O'Connor Hospital, including: admitting clerk; admitting clerk (radiation therapy); admitting representative; ambulatory services secretary; bed control coordinator; bill hold/charge auditor; cardio-pulmonary technician; case management assistant; cath lab scheduler; central supply technician; certified nursing assistant; certified nursing assistant (ASU); charge capture auditor; clinical assistant/back & front office; communication tech; cook; dietary clerk; dietary clerk lead; EKG tech; ER secretary; ER tech; ER tech II; ER tech lead; food service worker; food service worker lead; housekeeper; housekeeper lead; laboratory assistant I; laboratory assistant II; laboratory assistant III/certified phleb tech; laboratory clerk; mail clerk; materials technician lead; medical assistant; monitor technician; MRI scheduler; nuclear medicine scheduler; OB scrub technician; OB scrub technician lead; orderly; ortho tech; pathology aide; pathology aide histology; pathology aide histology trainee; pathology clerk; patient trans/courier; patient trans/courier lead; pharmacy technician; pharmacy technician/buyer senior; physical therapy aide; radiation clerk; radiology admitting clerk; radiology clerk; radiology clerk lead; radiology scheduler; radiology scheduler lead; receptionist-Center for Life; receptionist-Wound Care Clinic; respiratory therapy equipment technician; sports medicine office assistant; storekeeper; storekeeper lead; transcriber; transcriber clerk medical records; transcriber senior medical records; transcriptionist clerk medical records; tumor registry f/u secretary; and ultrasound secretary. **Excluding:** all executive and professional employees; employees presently in other bargaining units recognized by O'Connor Hospital; guards; and supervisors as defined in the National Labor Relations Act.

There are approximately 450 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **National Union of Healthcare Workers**, or **Service Employees International Union, United Healthcare Workers-West**, or

neither. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States Government may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees engaged in a strike who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within **seven** days of the date of this Decision, the

Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both the preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 1301 Clay Street, Suite 300N, Oakland, California 94612 on or before **May 20, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, **www.nlr.gov**,¹⁰ by mail, by hand or courier delivery, or by facsimile transmission at **(510) 637-3315**. Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of **three** working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least **five** full working days prior

¹⁰ To file the eligibility list electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu, and follow the detailed instructions.

to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **May 27, 2010**. This request may **not** be filed by facsimile.

Dated at Oakland, California this 13th day of May, 2010.

/s/ Alan B. Reichard
Alan B. Reichard
Regional Director
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5224